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No. 96-1591

In the Supreme Court of the United States

October Term, 1996

Arthur Calderon, Warden, *Petitioner*,

v.

Benjamin Wai Silva, *Respondent*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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REASONS FOR DENYING THE WRIT

Certiorari Should Not Be Granted since the Lower Courts Have Not Ruled on the Question Presented Here

This is not an appropriate case for review by this Court since the question Warden Calderon advances has not been decided by either of the lower courts in this matter.

The Ninth Circuit ruling from which Warden Calderon now seeks review did no more than deny him permissive interlocutory review under 28 U.S.C. §1292(b).[1] Yet, Warden Calderon mischaracterizes the Ninth Circuit's denial of discretionary review as a ruling on the merits of the claim which he attempted to raise in that court, namely that the Antiterrorism and Effective Death Penalty Act (herein "the Act") is retroactive and should operate to preclude Silva from receiving an evident ary hearing in his federal habeas corpus proceedings.[2] This Court should not condone this effort and should deny the petition.

The Ninth Circuit did not decide in this case that the Act was retroactive in its application

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[1] The analysis the Ninth Circuit undertakes when it evaluates a petition for leave to appeal pursuant to 28 U.S.C. §1292(b) has long been clear: "When a party seeks a section 1292(b) interlocutory appeal, the court of appeals must undertake a two-step analysis. First, we must determine whether the district court has properly found that the certification requirements of the statute have been met. These certification requirements are (1) that there be a controlling question of law, (2) that there be substantial grounds for difference of opinion, and (3) that an immediate appeal may materially advance the ultimate termination of the litigation. If we conclude that the requirements have been met, we may, but need not, exercise jurisdiction. The second step in our analysis is therefore to decide whether, in the exercise of the discretion granted us by the statute, we want to accept jurisdiction." *In re Cement Antitrust Litigation (MDL No. 296)*, 673 F.2d 1020, 1026 (9th Cir. 1982)

[2] Silva has never received an evidentiary hearing before any court, state or federal.

to Mr. Silva.[3] The Ninth Circuit did not discuss nor rule upon the retroactivity of the Act or its proper application to Mr. Silva s proceedings in the District Court. As Mr. Silva's opposition to Warden Calderon's petition before the Ninth Circuit made clear, there were a multitude of reasons upon which the Ninth Circuit could have based its denial of interlocutory review, chief among them the fact the District Court explicitly stated that it was not addressing the retroactivity of the Act. In pertinent part, the District Court's order states as follows:

> 5. Retroactivity of 28 U.S.C. §2254(e).
>
> This Court does not have to address the retroactivity of 28 U.S.C. §2254(e) because whether or not it applies, there is no substantive change to the standards governing the grant of evidentiary hearings. In other words, the amendment is a codification of pre-existing case law which was controlling case law when this Court originally granted the evidentiary hearing. Since the amendment effected no real change, whether it is applied to this case or not is of no consequence.
>
> 6. The Ex Post Facto Argument and the Due Process Argument.
>
> Since an examination of the amendment at issue reveals that there is no substantive change in the standards utilized to determine whether an evidentiary hearing should be granted, the Court does not need address Silva's arguments that the Ex Post Facto Clause would prohibit the application of the Act to pending cases, or that application of the Act would result in a violation of due process.

Appendix B at B-27 to B-28.

Thus, in arguing to the Ninth Circuit that it should review the District Court's decision that the Act was not retroactive, Warden Calderon summarily ignored the District Court's explicit statement that it was not making such a finding or ruling on that issue. Warden

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[3] As reflected in Mr. Silva's Opposition to Warden Calderon's Petition to the Ninth Circuit for Interlocutory Review, there were a multitude of reasons that would have justified the Circuit's decision to deny the extraordinary appellate review that Warden Calderon was seeking: e.g., the District Court did not rule on this question; the requested review would not materially advance the litigation since, regardless of the outcome of this issue, there were additional issues the District Court would still be required to address; the fact that the evidentiary record had already closed in the District Court proceedings meant that a decision in this case would not provide guidance to other courts due to the particular posture of this litigation. *See* Appendix.

Calderon persists in his refusal to accep. the District Court's reasoning by advancing --- now to this Court -- a construction that cannot find support in the decisions of the District Court or the Ninth Circuit. Those courts did not rule on this question in deciding to allow Mr. Silva the first evidentiary hearing he has ever had in his capital habeas proceedings.

All that the Ninth Circuit did was dismiss Warden Calderon's petition for interlocutory review, observing in the process that in a different matter the Ninth Circuit had determined that the Act was not applicable to cases pending in the federal courts at the time of its enactment. For this reason, if any petition for certiorari were to issue, it could properly address solely whether it was an appropriate exercise of judicial discretion for the Ninth Circuit to deny Warden Calderon the extraordinary interlocutory review he sought.[4]

CONCLUSION

This case is not an appropriate case for determination of the question Warden Calderon advances. The Ninth Circuit did not give rule on the merits of ***any*** question; it merely denied discretionary review. The District Court explicitly stated that it was not ruling upon the question Warden Calderon advances in this Court. This Court should deny the petition for certiorari.

Respectfully submitted,

Phillip A. Treviño

Dated: May 19, 1997

Phillip A. Treviño

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[4] Nothing in the proceedings had to date in the Ninth Circuit will preclude Warden Calderon from obtaining review on the merits of his claim after a judgment issues from the District Court.

No. 96-80269

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BENJAMIN WAI SILVA,

Petitioner-Respondent,

v.

ARTHUR CALDERON, et al.,

Respondent-Petitioner.

DEATH PENALTY CASE

ANSWER TO PETITION FOR PERMISSION TO APPEAL

UNDER 28 U.S.C. §1292(b)

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No. 96-80269

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BENJAMIN WAI SILVA,

Petitioner-Respondent,

v.

ARTHUR CALDERON, et al.,

Respondent-Petitioner.

DEATH PENALTY CASE

ANSWER TO PETITION FOR PERMISSION TO APPEAL

UNDER 28 U.S.C. §1292(b)

TO THE HONORABLE JUDGES OF THIS COURT:

Petitioner-Respondent Benjamin Wai Silva,[1] by and through his attorneys of record, Phillip A. Treviño and Michael J. Brennan, hereby answers and opposes Respondent-Petitioner

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[1] Pursuant to Rule 28 of the Federal Rules of Appellate Procedure, the following denomination is used for references to the Parties: Petitioner in the District Court (and Respondent in this matter before this Court) is referred to as Mr. Silva in all instances excerpt where otherwise referred to as Petitioner during previous court proceedings and records; Respondent in the District Court (and Petitioner before this Court) is similarly referred to as Warden Calderon.

Warden Calderon's Petition for leave to pursue an interlocutory appeal of the District Court's decision to proceed with an evidentiary hearing in this capital matter.

Respectfully submitted,

Dated: May ___, 1997

Phillip A. Treviño

Introduction

Interlocutory review should not be granted for several reasons. Fundamentally, the order Warden Calderon seeks to have reviewed concerns whether the newly enacted Antiterrorism and Effective Death Penalty Act (referred to herein as "the Act") should deprive Mr. Silva of the evidentiary hearing which the District Court has granted him. As will be shown, this order simply does not meet the statutory requirements for such extraordinary review. As presented by the facts of this case, the District Court's order is so narrow that, contrary to Warden Calderon's view, an interlocutory appeal would not offer other District Courts the guidance in applying the Act to other cases since this case and the challenged ruling are predicated upon entirely distinguishable facts.

In addition, interlocutory appeal of the issue will not materially advance the litigation below, and may ultimately serve to delay the lower court proceedings. Interlocutory review would fully resolve the question of Mr. Silva's entitlement to an evidentiary hearing only if this Court were first to decide the proper application of the Act, and then, if it decided that question adversely to Mr. Silva, if the Court were to go on to decide additional constitutional issues, which are not discussed by Warden Calderon's petition and which the District Court did not reach.[2] Since the District Court sustained Mr. Silva's right to this evidentiary hearing on other

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[2] As explained elsewhere in this pleading, even then the litigation below would not be materially advanced thereby. As the District Court noted when it announced its decision sustaining its previous grant of a hearing, even if that particular decision were appealed and overturned, it would still need to proceed to review various other materials that had been offered in support of the claims pending before it. For this reason, Mr. Silva disagrees with Warden Calderon's premise that interlocutory review will materially advance the proceedings below. Whatever resolution may be had relative to the question Warden Calderon seeks to put before the

grounds, it did not reach the constitutional issues involved. Accordingly, even assuming this Court were to disagree with the District Court's order, unless this Court were to reach the constitutional grounds raised - but not decided - below, interlocutory review would not expedite the matters below. Rather, the District Court would then be required, on remand, to address significant constitutional issues before determining whether to proceed with an evidentiary hearing. Although Warden Calderon does not discuss these points in his Petition, the only plausible way an interlocutory appeal could expedite the litigation below is if, upon resolution of this initial question, this Court were then additionally to consider and resolve issues of constitutional proportion which were not considered or resolved below. Such a result, if obtained, is an improper expansion of, and far beyond, what §1292(b) contemplates.

Finally, Warden Calderon's petition must be recognized as an abuse of the appellate process, for it invokes complex arguments which were never presented to or considered by the District Court. It is Warden Calderon's position here, never presented to the District Court, that the Act rewrote virtually an entire decade of capital habeas jurisprudence. The petition argues that the District Court's interpretation of the Act is at odds with more than a decade of legislative history that, according to Warden Calderon, must be considered to understand the background and scope of the Act. Mr. Silva objects to Warden Calderon's arguing points before this Court that he did not present to the District Court for consideration. An interlocutory appeal should not granted where, as here, the would-be appellant advances arguments not presented

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Court now, even should he prevail ultimately on the merits, the proceedings before the District Court will not thereby be concluded.

below.

The District Court's decision to sustain its prior grant of an evidentiary hearing was a proper exercise of the judicial function in applying newly enacted legislation to ongoing litigation. The District Court analyzed the newly enacted statute as well as the case law and determined that Mr. Silva was entitled to offer evidence in support of his claims. The District Court accordingly concluded that the Act did not warrant reversal of its prior decision to afford an evidentiary hearing. The District Court's decision was well reasoned and should not be the subject of review on an interlocutory basis. For this reason it is respectfully urged the Court should deny Warden Calderon's request to commence piecemeal appellate litigation.

Procedural and Factual Background

Following his conviction at trial, Mr. Silva was sentenced to death by a California jury. Thereafter, he appealed both his conviction and sentence to the California Supreme Court. Concurrent with his direct appeal to that court, Mr. Silva also sought the state court's review by habeas corpus of both his conviction and sentence. In his ensuing state petitions for habeas corpus review, he alleged, *inter alia*, ineffective assistance of counsel. These claims alleged various ways in which Mr. Silva had been denied his Sixth Amendment right to the effective assistance of counsel at his trial. No hearing was granted on the petitions by the California Supreme Court and they were summarily denied. Mr. Silva's direct appeal was similarly denied.

After unsuccessfully petitioning the U.S. Supreme Court for review by certiorari, Mr. Silva filed a petition for a writ of habeas corpus in the United States District Court for the

Central District of California. In his petition, Mr. Silva again alleged various instances of ineffective assistance of counsel. In order to sustain his burden of proof, Mr. Silva sought leave to obtain discovery and thereafter to present evidence in support of his claims at an evidentiary hearing. These requests were initially denied by the District Court.

Following other proceedings not germane here, Mr. Silva was permitted to amend his petition. His amended petition included some claims which the District Court found to be reiterations of previous claims, and other claims which the District Court found to be genuinely new. These "new" claims were found to be unexhausted in that they had not been presented to the California Supreme Court for decision. Mr. Silva thereupon presented the unexhausted claims to the California Supreme Court, and that court again summarily denied relief.

It was at this juncture that the District Court reconsidered its previous rulings relative to whether Mr. Silva should receive discovery and an evidentiary hearing. In doing so, the District Court analyzed those questions in a fifty-seven (57) page order. Lending substantial deference to the fact that Mr. Silva had never been afforded, in any court, the opportunity to demonstrate the evidentiary support for his claims of constitutional deprivation, the District Court concluded that both discovery and a hearing were warranted on selected claims contained in the petition.[3]

As a result of the District Court's decision, the parties thereupon undertook what would

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[3] Mr. Silva notes that he has previously objected to, and continues to object to, the District Court's denial of a discovery and/or a hearing as to certain issues upon which he seeks relief. Nothing set forth here should be construed as a waiver of any such objections.

prove to be a relatively difficult discovery process.[4] At the conclusion of that process, the parties prepared and submitted to the District Court a stipulation which delineated the written materials which the parties agreed would comprise the record of the evidentiary hearing.[5] The stipulation further noted that no live testimony would be received and that, with receipt of the specified materials, the record would be deemed closed.

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[4] This process was complicated principally by the unwillingness of trial counsel to cooperate. While Warden Calderon is correct in noting that trial counsel sought compensation for his fees, that was by no means the sole difficulty brought about by trial counsel's behavior. These concerns were discussed repeatedly with Warden Calderon's counsel, and at each juncture, whenever possible, efforts were made, and frequently by agreement of the parties, to accommodate trial counsel. Nonetheless, as the record does clearly disclose, a formal subpoena was sought to secure trial counsel's attendance at the scheduled evidentiary hearing. Notwithstanding the District Court's issuance of the subpoena, trial counsel refused to accept service by the U.S. Marshal, instead advising the undersigned counsel he would have to be arrested and brought in forcibly by the Marshal. Additionally, he noted that he intended to speak with the "presiding judge" about District Court Judge Tevrizian's "behavior." This was but a continuation and culmination of the demeanor he had been exhibiting. The undersigned counsel advised Warden Calderon's counsel, Robert Foster, of the same, and noted that he was unable to determine whether trial counsel would appear at the evidentiary hearing. These, and further, facts were all promptly brought to Mr. Foster's attention over the course of the months long discovery process. Nonetheless, Warden Calderon has represented to this Court that there is no indication in the record to support the argument that trial counsel has been uncooperative in the habeas process. It is only due to ongoing efforts by current federal habeas counsel, and to the extent possible, agreements reached with opposing counsel, that the District Court was not burdened with such matters. Both parties consistently sought to resolve these matters between themselves, and have accordingly had no need to file pleadings documenting the ongoing problems. This does not change or otherwise compensate for the difficulties Mr. Silva has encountered in accomplishing these goals. Warden Calderon's averment that "[t]here is no support for th[e] claim [that trial counsel was unwilling to cooperate] in the record" (*Petition*, page. 29, n. 3) must be viewed against this background for a full appreciation of the matter.

[5] These materials included exhibits previously filed with the District Court, materials filed concurrent with the stipulation, and transcripts of the depositions taken during the discovery process.

On April 29, 1996, the District Court signed the proposed order which accompanied this stipulation. However, the order was contingent upon resolution of the present issue regarding the application of the Act which became effective six (6) days prior to the hearing.

After the parties had briefed the application of the new Act to this matter, the District Court, in a seventeen (17) page written order, concluded that its previous order granting the evidentiary hearing should stand, notwithstanding the passage of the Act. It is from this order that Warden Calderon seeks interlocutory review.

It is to be noted that, should the District Court's order stand, the only proceeding which remains before the District Court relative to the evidentiary hearing is the briefing of the unadjudicated issues presented by the petition and as to which the evidentiary record is already closed and before the District Court.

Question Presented

The question the District Court faced was whether a federal capital habeas petitioner, who has never been afforded (by any court, state or federal) the opportunity to present evidence in support of his federal constitutional claims, and who has presented his claims to the highest state court and thereupon was denied relief, has a right to offer evidence in support of those claims? As the record below discloses, the District Court reached this question only after having determined both that there are factual issues joined by the claims and that, if the petitioner is able to sustain his burden, he will be entitled to relief. After passage of the Act, the District Court was asked to reconsider its decision.

The District Court's renewed conclusion, rooted in an analysis of the controlling case law as well as the new Act, was that, under the circumstances presented by this case, Mr. Silva was still entitled to an opportunity to submit evidence to prove his claims.

Warden Calderon seeks, by way of interlocutory appeal, to have this Court review that decision. He argues that the new Act operates in such a way as to preclude Mr. Silva from ever having a hearing on any of his constitutional claims. The District Court rejected this argument and choose to proceed with the hearing. To permit Warden Calderon the opportunity to seek interlocutory review, the District Court agreed to stay its proceedings, however.

This Court should deny interlocutory review and permit the District Court proceedings to go forward. As will be shown below, Warden Calderon has not carried and cannot carry his burden of justifying the unusual disruption of District Court proceedings with an interlocutory appeal in this matter. Additionally, no prejudice will occur to Warden Calderon's ability to seek review of this order in the normal course of proceedings, namely after a final decision and judgment have been entered in the District Court.

THIS CASE DOES NOT SATISFY THE REQUIREMENTS FOR DISCRETIONARY INTERLOCUTORY APPELLATE REVIEW UNDER 28 U.S.C. §1292(b).

Interlocutory appellate review under 28 U.S.C. §1292(b) is available only in certain limited circumstances, none of which are found here. As this Court has stated:

> When a party seeks a section 1292(b) interlocutory appeal, the court of appeals must undertake a two-step analysis. First, we must determine whether the district

court has properly found that the certification requirements of the statute have been met. These certification requirements are (1) that there be a controlling question of law, (2) that there be substantial grounds for difference of opinion, and (3) that an immediate appeal may materially advance the ultimate termination of the litigation. If we conclude that the requirements have been met, we may, but need not, exercise jurisdiction. The second step in our analysis is therefore to decide whether, in the exercise of the discretion granted us by the statute, we want to accept jurisdiction.

In re Cement Antitrust Litigation (MDL No. 296), 673 F.2d 1020, 1026 (9th Cir. 1982)

As will be shown, the certification of this matter for interlocutory appeal was improvident, and such review should not be granted. However, even if this Court should conclude otherwise, this Court should exercise its discretion, decline to hear the appeal at this point, and thereby permit the District Court proceedings to resume.

When these points are considered in the context of this case, as well as against the general proposition that piecemeal appeals are disfavored,[6] it becomes clear that Warden Calderon's petition for leave to file an interlocutory appeal should be denied.

I.

The Order Appealed from does not Involve a

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6 *Switzerland Cheese Ass'n, Inc. v. E. Horne's Market, Inc.*, 385 U.S. 23 (1966)(federal law has an expressed policy against piecemeal appeals); *see also Matterhorn, Inc. v. NCR Corp.*, 727 F.2d 629 (7th Cir. 1984); *and D'Ippolito v. Cities Service Co.*, 374 F.2d 643 (2d Cir. 1967).

"Controlling Question of Law" as that Term is Used in 28 U.S.C. §1292(b)

Warden Calderon has taken significant license in framing his questions in his attempt to receive permission to proceed with an interlocutory appeal. It true that the District Court certified this matter for a possible interlocutory appeal.[7] A simple review of the District Court's order (attached as Exhibit 2 to the Petition) discloses that it did not, however, certify the questions that Warden Calderon now seeks to put before the Court. In fact, the District Court certification recites no particular question as justifying this review. It contains simply the unexplicated assertion that its June 26, 1996, order implicates a "controlling question of law." Warden Calderon's petition must be considered in this light.

The first two questions Warden Calderon urges in his Petition are not simply not questions the District Court decided. The third question is far too fact-bound a question to be properly characterized as a controlling question of law. Additionally, the questions Warden Calderon has framed must be decided adversely to him in any event.

Warden Calderon contends the following questions are presented for review here:

1. Did the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 so alter the statutory standards for granting an evidentiary hearing in federal habeas corpus cases that the holdings in *Townsend v. Sain*, 372

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[7] Of course, as this Court is no doubt well aware, even the simple fact the District Court has certified the order below to raise a "controlling issue of law" is a finding that is not binding upon this Court and which this Court should examine anew to its satisfaction. "The opinion of the district judge that a controlling question is involved, while deserving of careful consideration, is not binding upon this court when we are called upon to exercise our discretion under the statute." *United States v. Woodbury*, 263 F.2d 784, 787 (9th Cir. 1959).

U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963), and *Brown v. Allen*, 344 U.S. 443, 73 S.Ct. 397, 97 L.Ed. 469 (1953) are no longer good law?

2. Are the amendments to 28 United States Code section 2254(d) contained in this new legislation applicable to cases pending in the federal district courts when the legislation was signed into law?

3. Did Petitioner make the requisite showing under the new legislation that he was entitled to an evidentiary hearing under the new standards?

Petition, pages 2-3.

The District Court did not sustain its grant to Mr. Silva of an evidentiary hearing because of any "statutory" requirement. Indeed, the District Court's analysis did not implicate - despite Warden Calderon's protestations - the success or the failure of the Act to overrule or otherwise invalidate *Townsend* and *Brown*. Rather, as those cases demonstrate, the entitlement to an evidentiary hearing is rooted in constitutional and common law principles.[8] These principles have been given structure by subsequent statutory provisions, a point the District Court noted and discussed. However, this does not permit Warden Calderon's flawed premise that therefore

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[8] "The broad considerations bearing upon the proper interpretation of the power of the federal courts on habeas corpus are reviewed at length in the Court's opinion in *Fay v. Noia*, 372 U.S. 391, 83 S.Ct. 822, and need not be repeated here. We pointed out there that the historic conception of that writ, anchored in the ancient common law and in our Constitution as an efficacious and imperative remedy for detentions of fundamental illegality, has remained constant to the present day. We pointed out, too, that the Act of February 5, 1867, c. 28, s 1, 14 Stat. 385--386, which in extending the federal writ to state prisoners described the power of the federal courts to take testimony and determine the facts de novo in the largest terms, restated what apparently was the common-law understanding. *Fay v. Noia*, 372 U.S., p. 416, 83 S.Ct., p. 837, n. 27." *Townsend v. Sain,* 372 U.S. at 310-311.

subsequent statutory changes can abrogate the underlying constitutional principles which ultimately govern these questions.

The District Court's discussion of *Townsend* was simply designed to illustrate how the statutory provisions provided a framework in which a court could analyze whether to grant a hearing. It did not, however, purport to reduce the right to a hearing, or the writ of habeas corpus itself, to a non-constitutional dimension as Warden Calderon is trying to do. The District Court simply discussed the statutory framework by which it had reached its decision, and thereafter reaffirmed its view that, based upon the case law, Mr. Silva was entitled to the hearing. Since the case law the District Court discussed in its decision makes clear habeas corpus has constitutional dimensions, it flows logically that the District Court did not perceive the question as Warden Calderon does. Clearly statutory provisions do not summarily invalidate constitutional principles.[9] For this reason, Warden Calderon's first question is not the question decided by the District Court.

As to the second question Warden Calderon suggests to this Court, the District Court does not appear to have considered whether §2254(d) (as amended) even applies to this matter.[10]

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9 Moreover, the District Court did not even perceive any tension between the newly enacted statutory provisions and the pre-existing case law which delineated the right to an evidentiary hearing. Rather, the District Court quite properly and easily harmonized the new provisions with the case law. "The Act did not change the law governing evidentiary hearings, instead it merely codified the decision of *Tamayo-Reyes* to ensure that a controversial five to four decision by the Supreme Court would be consistently followed." *Order*, page 13, lines 7-10.

10 As the District Court notes in its *Order*, "The basis asserted by the Attorney General for vacating the order granting an evidentiary hearing is the changes made to 28 U.S.C. §2254(e) by the Act." *Order*, page 8, lines 2-4. Nowhere in the *Order* does the District Court

Rather, its decision discusses the amendments to 28 U.S.C. §2254(e), discussing its operation and concluding that it found it unnecessary to address the question of that section's retroactivity. *Order*, page 16, lines 13-20 (attached as Exhibit 1 to Petition).

Since Warden Calderon had not mentioned 2254(d) at all in his initial pleading invoking the new Act, and thereafter mentioned it only in passing in his reply to Mr. Silva's opposition to the request for reconsideration of the entitlement to an evidentiary hearing, it is most plausible the District Court did not even perceive this as a basis asserted by Warden Calderon for seeking to preclude a hearing. It is clear that the District Court did not rule on this point. Not having received a decision on this point from the District Court, Warden Calderon should not be permitted to raise the point here for the first time.

Finally, Warden Calderon's third question, whether Mr. Silva has made the requisite showing that he is entitled to an evidentiary hearing under the new provisions, is, by its very terms, a factually oriented question rather than a question of law. As such, it does not warrant the extraordinary review implicated by interlocutory appeal.[11]

Although this Court has recognized that Congress left the definition of "controlling question of law" unclear, there is guidance to be found in the area.

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discuss or construe 2254(d)(as amended). (There is discussion of the *prior* 2254(d), however, at page 10.)

[11] Additionally, this question is subsumed in the first question discussed above. Since the new provisions harmonize with the pre-existing case law, and since the District Court determined that Mr. Silva was entitled to a hearing under those provisions, there is no "new" finding here relative to the Act. This component of the District Court's decision is integral to and a logical consequence of the first analysis.

> While Congress did not specifically define what it meant by "controlling," the legislative history of 1292(b) indicates that this section was to be used only in exceptional situations in which allowing an interlocutory appeal would avoid protracted and expensive litigation. *United States Rubber Co. v. Wright*, 359 F.2d 784, 785 (9th Cir. 1966) (per curiam); *Milbert v. Bison Laboratories*, 260 F.2d 431, 433-35 (3d Cir. 1958). Although some circuits have criticized such a narrow approach to interlocutory appeals, *see, e.g., Hadjipateras v. Pacifica, S.A.*, 290 F.2d 697, 702-03 (5th Cir. 1961), recently the Supreme Court in *Coopers & Lybrand* indicated its approval of the "exceptional circumstances" standard of section 1292(b) when it stated that the appellant "still has the burden of persuading the court of appeals that exceptional circumstances justify a departure from the basic policy of postponing appellate review until after the entry of a final judgment." *Coopers & Lybrand*, 437 U.S. at 475, 98 S.Ct. at 2461.

In re Cement Antitrust Litigation (MDL No. 296), 673 F.2d 1020, 1026 (9th Cir. 1982). This ability to avoid protracted and expensive litigation is a showing that Warden Calderon has not made and cannot make. Almost all of the underlying litigation relative to the evidentiary hearing has already concluded in the District Court. Regardless of how this Court might decide the application of the Act, the District Court will be required to evaluate the claims in the petition and to render a decision thereupon. There is simply no justification for disrupting the normal course of this litigation.

In *In re Cement Antitrust Litigation (MDL No. 296)*, this Court went on to note the

following:

> Some courts have adopted the view that a question is controlling if it is one the resolution of which may appreciably shorten the time, effort, or expense of conducting a lawsuit, *see Katz v. Carte Blanche Corp., supra*, 496 F.2d at 755-56; *Hadjipateras v. Pacifica, S.A., supra*, 290 F.2d at 702; *E. F. Hutton & Co. v. Brown*, 305 F.Supp. 371, 403 (S.D.Tex.1969), thus essentially reading the "controlling question of law" requirement out of section 1292(b). We reject this approach. Congress could easily have chosen only to require that a question materially advance the litigation in order for it to be immediately reviewable. Since Congress chose to add the additional requirement that the issue for which review is sought must be a "controlling question of law," it would be improper for us to construe the statute as though these two requirements were interchangeable.

Id., 673 F.2d at 1027. Warden Calderon has not demonstrated how granting his petition would materially advance this matter.

In addition, the questions Warden Calderon presents are not the "clear-cut question[s] of law, against a background of determined and immutable facts" which another court found justifies interlocutory review. As the Temporary Emergency Court of Appeals noted in denying review in *Lerner v. Atlantic Richfield Co.*, 690 F.2d 203 (Temp. Emer. Ct. App. 1982), "The question of law decided does not meet the requirement that ". . . the order involve a clear-cut question of law, against a background of determined and immutable facts." 9 Moore's Federal Practice P 110.22(2); Wright, Law of Federal Courts s 102 (3rd ed.), Note 53 at page 518."

Lerner, 690 F.2d at 211.

As the *Lerner* court went on to discuss, additional light was cast on why the questions before that court did not lend themselves to interlocutory review when one considered that:

> In pretrial or trial, after all possible amended pleadings and potential evidence are submitted and all theories of discovery explored, a judgment for or against the petitioner may be entered on the petitioner's claim in a manner that makes immaterial the issues determined by the partial summary judgment. The action of the District Court in refusing to enter a full summary judgment is evidence of a reservation of decision on other possible theories of recovery by petitioner Lerner.

Id. So, too, here there are still a myriad of remaining possible outcomes. The District Court has not entered judgment for or against Mr. Silva on any of these claims. After consideration of the proffered evidence, the District Court may still resolve the claims in a variety of ways. For this reason, even assuming arguendo that the District Court's decision should later be held erroneous, this does not mean that the ultimate result of the litigation will necessarily be reversed.

There is no "controlling question of law" at work here. The issue that has been decided is simply one of many procedural steps toward a final judgment on the merits. For these reasons, Warden Calderon's petition is misguided and should be denied given the factual underpinnings of the District Court's ruling.

II.

The Factual Basis of the District Court's Order Gives Rise To A Narrow Question Which Does Not Warrant Exercise of this Court's Discretionary Interlocutory Appellate Jurisdiction

The evidentiary hearing contemplated in this matter by the District Court will address a very limited range of fact-bound questions.

The principal focus of the evidentiary hearing is relative to whether Mr. Silva's trial counsel was ineffective in his representation of Mr. Silva at his capital trial. Mr. Silva first advanced his position that his trial counsel had been ineffective while pending review of his conviction by the California Supreme Court.[12] Although Warden Calderon seems to suggest otherwise here, Mr. Silva contends that the California Supreme Court's habeas procedures effectively prevented him from presenting the evidence necessary to secure relief from that court. The District Court adopted Mr. Silva's position on this point in its most recent order,[13]

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12 Mr. Silva has persisted in this contention, which has been amplified to some extent, as his matter has gone from state review of his conviction and sentence to habeas review in federal district court.

13 As noted in Mr. Silva's pleading entitled "Opposition to the Motion to Vacate the Court's Prior Order Granting an Evidentiary Hearing":

> "This Court will wish to note that the California Supreme Court's practice in capital habeas matters has been and is to receive petitions for a writ of habeas corpus in capital matters initially without any responsive pleading from the California Attorney General's Office. In the event the Court calls for a response from the California Attorney General's Office, it terms the subsequent briefing "informal." Thereafter, based upon its review of the matter, its practice has been either to deny the petition summarily, or it may issue an order to show cause.
>
> Only if an order to show cause is issued does the matter become a "cause" within the meaning of that term in the California Constitution, Article VI, §14. It is accordingly only at that point that any of the rights litigants otherwise enjoy even arguably begin to attach.
>
> Accordingly, when a capital litigant is not even granted consideration of his matter by issuance of an order to show cause, he is denied relief prior to having even an arguable entitlement to discovery and the other fact-finding processes of the court.
>
> In cannot be said, either, that such a litigant will have any different success

finding that "when a state prisoner files a state habeas petition, he cannot fully develop the factual basis of the petition until the state court issues an order to show cause, which then entitles the petitioner to discovery and to other fact-finding processes of the court. Here [Mr. Silva] was not allowed to obtain discovery and was not granted a hearing in state court, either of which would have allowed petitioner to develop his claims." *Order*, page 14, lines 1 - 7.[14]

> in the court from which his cause originated. In *People v. Gonzalez*, 51 Cal.3d 1179 (Cal. 1990), the California Supreme Court stated clearly that, as it reviewed its decisions dating back as far 1952, it was persuaded thereby that once a criminal matter was concluded in the trial court there was no action pending, and accordingly, no vehicle via which a trial court could consider or grant a convicted defendant discovery of any nature.
>
> As recently explained . . ."a trial court [lacks authority] to entertain a post judgment discovery motion which is unrelated to any proceeding then pending before [that] court. . . . "
> *Gonzalez*, 51 Cal.3d 1257. (citation omitted) This principle, coupled with the California Supreme Court's "informal" consideration of habeas corpus petitions it receives, means that a capital defendant, unless or until the California Supreme Court issues an order to show cause relative to his petition, has no judicial resource available to him through which he can obtain discovery or otherwise expect to develop his claims." *Opposition*, page 29, line 21, through page 30, line 20.

While Warden Calderon dismissed these points as irrelevant to the District Court's inquiry, (*Respondent's Reply to Petitioner's Opposition to Application of New Legislation*, page 21, lines 17 - 19), he did not in any way question, challenge, or seek to amplify this explanation of California Supreme Court habeas practice and procedure. It is respectfully submitted this failure to do so is precisely because the California Attorney General's Office was compelled to recognize it as an accurate recital of the limitations placed upon habeas petitioners' abilities to develop factual records in that court.

[14] It is of note that Warden Calderon did not challenge or other reject any of the explanations that Mr. Silva proffered the District Court regarding the procedures and case law followed by the California Supreme Court when it evaluates and adjudicates capital habeas petitions. However, here Warden Calderon seems to ignore his acquiescence below in these matters, and instead seeks to apply a different characterizations to the procedures with which his counsel, the California Attorney General, has been familiar for many years. It appears that in

Thus, Mr. Silva did not "fail to develop" the facts that he seeks to adduce in support of his claim. Rather, the California Supreme Court's case law and procedures are such that, upon the filing of his habeas petition, Mr. Silva was compelled to await leave of the state court before he could take the matter any further. Since that court thereupon summarily denied him relief, Mr. Silva was never permitted to undertake discovery before that court nor was he permitted to call witnesses in support of his claims at any type of evidentiary hearing.

The District Court also found that Mr. Silva has alleged various constitutional infirmities which go both to his conviction and his sentence. Since the California Supreme Court declined to grant him a hearing on these issues, coupled with the fact these issues - if proved - would invalidate the conviction and sentence, the District Court concluded that an evidentiary hearing is appropriate. On the facts of this case, these findings and conclusions are appropriate and correct.

Accordingly, the District Court's order granting Mr. Silva an evidentiary hearing flows logically from that court's understanding of both federal case law as well as California and federal habeas corpus procedures, all in place for decades. Those procedures, and the history of

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doing so he hopes this Court will conclude the District Court was erroneously informed, or that this Court will conclude that in fact Mr. Silva had more opportunity available to him than the record discloses, to develop facts in support of his petition for habeas relief in the state court system. Yet, Warden Calderon cannot openly dispute this since the case law and the practices of the California Supreme Court in this regard are too well known to his counsel to permit such a representation. The facts on this point are simply and clearly established: the California Supreme Court does not allow a habeas petitioner recourse to any judicial intervention until such time as it issues an order to show cause in the matter. No such order to show cause was issued in response to Mr. Silva's petitions before the California Supreme Court, and he was accordingly not permitted to develop his claims more than he did. The District Court was aware of these facts and took them into account in determining that it was appropriate for it to hold an evidentiary hearing.

this case, mandate an evidentiary hearing in the District Court. The District Court has not invalidated the Act, but rather simply and correctly determined that it against this particular background it does not operate to deprive Mr. Silva of a hearing.

Still further, and contrary to Warden Calderon's insinuation, this case does not present any overtones of intrusive federal meddling with state court judgments. The District Court is not simply "tinkering" with a state court decision. Rather, the state court procedure wholly precluded Mr. Silva from developing or presenting the evidence that is now before the District Court and by which Mr. Silva will be able to demonstrate the infirmities of his capital judgment. It is the denial of any state court procedure that has caused the District Court to grant the hearing.

There is no reason for this Court to grant interlocutory appeal.

III.

This matter will not be materially advanced by an interlocutory appeal

An interlocutory appeal will not materially advance this litigation in the District Court, and for this additional reason it should not be permitted. *U.S. v. Woodbury*, 263 F.2d 784 (9th Cir. 1959)(interlocutory appeals favored where, if decided in favor of appellant, the lawsuit would thereby be concluded).

The Temporary Emergency Court of Appeals has reviewed the circumstances under which it believes such permissive appeals should be permitted:

> . . . the four situations contemplated by the sponsoring Judicial Conference of the United States, and presumably by Congress, in adopting §1292(b) are summarized as follows (88 Harvard Law Review at 611, 612):

> In the hearings, four situations were identified where use of the interlocutory appeal procedure would be appropriate: (1) "cases where an (extended) accounting is necessary upon an adjudication of liability"; (2) "cases where a long trial would be necessary for the determination of liability or damages upon a decision overruling a defense going to the right to maintain the action"; (3) "cases involving third-party defendants where there would be no reason for going on if they could not be held liable"; and (4) "cases of transfer of causes when it is claimed that the transfer is not authorized by law (because the transferee court lacks jurisdiction of the parties)." Each of these situations is one where immediate appeal could avoid an unnecessary trial. Even though the Act is not in terms limited to such situations, there is no indication in these examples, or in any of the statutory materials, that the goals of alleviating hardship and supervising lower courts were intended to be considered under the Act. Trial court certification was not viewed as an invitation to the trial judge to "certify" difficult questions of general applicability to the courts of appeals. (Footnotes omitted.)

Lerner, 690 F.2d at 211-212. None of the enumerated circumstances can be said to exist here. There are but the two litigants in this matter, and regardless of the ultimate determination on this point they will invariably remain in the litigation. There is no "extended trial" that Warden Calderon will be able to avoid even in the event he should prevail here. At the last hearing, in discussing the possibility of an interlocutory appeal, the District Court indicated that, if the ruling

were overturned, further proceedings would still be necessary before it could rule on the petition.

Assuming this Court were to grant interlocutory review, the only issue presented here concerns the application of the Act to the peculiar procedural history of Mr. Silva's case. If this Court were to reverse the District Court, such a ruling would not be dispositive of the larger question of whether or not Mr. Silva is entitled to an evidentiary hearing. The District Court affirmed its prior decision granting an evidentiary hearing without deciding several of the various constitutional bases upon which Mr. Silva had argued that it would be error to deny the hearing, including *inter alia*, the application of the Ex Post Facto and Due Process provisions. Accordingly, should this Court conclude the order granting the hearing is otherwise invalid in light of the reasons given by the District Court, it would remain for the District Court to adjudicate the remaining objections Mr. Silva has lodged relative to application of the Act to his matter.[15]

Because there are significant constitutional issues which would be implicated by the denial of a hearing, an interlocutory appeal will not materially advance this litigation. As a consequence, this predicate for §1292(b) review is not satisfied.

Additionally, given that discovery has been concluded, and that the complete evidentiary record is already before the District Court without any need for receipt of any further evidence,

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[15] Of course, this Court might choose to entertain the constitutional objections that Mr. Silva raised below without affording the District Court the opportunity to do so. Such a procedure, if employed, would not only disrupt the normal course of judicial review but would also conflict the rule that constitutional questions should be avoided when possible, particularly in the context of an interlocutory appeal. *Yahr v. Resor*, 431 F.2d 690, 691 (4th Cir.), *cert. denied*, 401 U.S. 982 (1970).

there is no reason to believe that review by this Court at this juncture would materially advance the overall litigation in this matter.

The "hearing" that is to occur is simply submission on the written materials already before the District Court. There is to be no formal evidentiary hearing, simply briefing of the issues that are before the lower court. However, even if that were somehow perceived as a burden, it has been specifically noted that the potential burdens of litigation cannot alone justify an interlocutory appeal. *In re San Juan Star Co.*, 662 F.2d 108 (1st Cir. 1981). Similarly, interlocutory review of evidentiary questions has previously met with disapproval from this Court. *Matter of Fischel*, 557 F.2d 209, 213 (9th Cir. 1977).

In contrast to the simple submission of the matter to the district court which will occur absent interlocutory review, should this Court grant interlocutory review and reverse the ruling granting the hearing, then it would be necessary for the litigants to determine which of the other materials could still be considered by the District Court in support of Mr. Silva's claims so that a decision could be rendered on the petition.[16] Accordingly, it is eminently plausible that rather than expedite the litigation in the lower court, interlocutory review would in fact ultimately accomplish the opposite. Not only would the litigants be faced with the additional time and burden of litigating these issues here (and as discussed below, litigating new issues in this Court

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16 This Court may wish to note that a variety of additional materials have been lodged with the District Court throughout the litigation in the District Court (which now spans six years). These materials include the pleadings and records from the previous habeas corpus proceedings (before the California Supreme Court as well as in the Superior Court), materials and records filed before the California Supreme Court while Mr. Silva's matter was on direct appeal, and various items and pleadings filed in the District Court relative to the various issues raised in the petition.

that were not raised before the lower court), but they would also be faced with the prospect that, if the lower court's order is disturbed, the only immediate result would be that additional proceedings would thereafter be necessary in the District Court. When contrasted against the present scenario (proceeding on a complete record as submitted to the District Court), Warden Calderon's request cannot be squared with §1292(b)'s requirement that interlocutory review materially advance the litigation.

Warden Calderon does not and cannot point to any reason this issue merits or requires review at this unusual juncture rather than after the District Court has given full consideration to the complete record and after a judgment has been entered. Warden Calderon has failed to show how an interlocutory appeal will materially advance this litigation, despite the fact that such a showing is a prerequisite to an appeal under §1292(b). *Fisons Limited v. U.S.*, 458 F.2d 1241 (7th Cir.), *cert. denied*, 405 U.S. 1041 (1972). His petition for permission to pursue an appeal in this manner should be denied.

IV.

This Matter does not present an Issue of First Impression

But Rather Merely Requires Application of Established Precepts of Statutory Construction

Warden Calderon argues that this matters merits interlocutory appeal since it presents an important issue that the District Courts are grappling with relative to the application of the new Act. However, the question that the District Court faced in this matter is one that courts face on a constant basis: when new legislation is enacted into law, courts must constantly decide whether it applies to any particular pending case or whether it is to be only to cases arising thereafter.

While important, this is in fact a rather mundane question on which there is much guidance in the case law. Warden Calderon's discontent over the District Court's decision does not convert the matter into such a novel issue that it cannot await post-judgment adjudication.

The District Court's approach and application of established principles of statutory construction further belies Warden Calderon's attempt to characterize this as a "novel" issue. The District Court recognized that even though the Act may be new, the law regarding its application is well established so that the decision here broke no new ground:

> This Court does not have to address the retroactivity of 28 U.S.C. §2254(e) because whether or not it applies, there is no substantive change to the standards governing the grant of evidentiary hearings. In other words, the amendment is a codification of pre-existing case law which was controlling case law when this Court originally granted the evidentiary hearing. Since the amendment effected no real change, whether it is applied to this case or not is of no consequence.

District Court's Order Denying Respondent's Motion to Vacate the Court's Prior Order Granting an Evidentiary Hearing, page 16, lines 13-20 (attached as Exhibit One to Warden Calderon's Petition for Permission to Appeal).

Thus, the order is based not merely upon the Act, but also upon pre-existing case law which also compels an evidentiary hearing under these circumstances. Whatever guidance this Court might be able to offer other courts by reviewing the Act will accordingly be diminished since, in this instance, the District Court's decision rests upon additional considerations beyond the Act.

V.

Warden Calderon raises objections here to the District Court's decision that were not presented to the District Court

Warden Calderon objects here to the District Court's order arguing here that the Act rewrote decades of habeas case law. This argument was never made to the District Court, and accordingly should not be permitted here, particularly in the context of an interlocutory appeal. In order to understand the record below, it is necessary to understand the way in which Warden Calderon brought this issue before the District Court.

The same day that President Clinton signed into law the Antiterrorism and Effective Death Penalty Act, Warden Calderon forwarded a pleading entitled "Notice of New Legislation with Points and Authorities" to Mr. Silva's counsel. The document was received that same day by facsimile, and met with an immediate response and objection from Mr. Silva's counsel. Mr. Silva's counsel immediately advised Warden Calderon's counsel that to the extent the "Notice of New Legislation" sought any relief from the District Court, he believed that it was not in compliance with the District Court's Local Rules. The specific requirements set forth by the Local Rules were noted in that conversation.

In particular, the District Court's Local Rules require all motions be in writing,[17] that they

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17 Rule 7.4 of the Local Rules of the Central District of California states: "Unless otherwise provided by rule or order of the Court, no oral motions will be recognized and every motion shall be presented by written notice of motion. The notice of motion shall be filed with the Clerk and served on each of the parties . . . If mailed, the notice of motion shall be served not later than twenty-four (24) days before the Motion Day designated in the notice. If served personally, the notice of motion shall be served not later than twenty-one (21) days before the Motion Day designated in the notice. . . The Court may order a shorter time." Local Rule 7.4

state with particularity the relief sought, that they contain the authority upon which the moving party seeks such relief, and they be filed with 21 days advance notice or, if time does not permit, that an application be made for an order shortening time and the justification therefor be shown.

In light of the perceived failure of Warden Calderon's pleading to conform to any of these requirements, Mr. Silva's counsel noted that he would and did object to the filing if submitted in the proposed form. Warden Calderon's response was to prepare an otherwise identical pleading with the different caption "Opposition to Evidentiary Hearing with Points and Authorities." Except for the change in caption, in all material respects the pleadings appear identical. Accordingly, even the revised pleading did not state with particularly what relief was sought from the District Court, was not presented to the Court as a formal motion, and failed utterly to advance any particular theory or authority in support of Warden Calderon's general objection to the conduct of the scheduled evidentiary hearing.

The procedural deficiencies of Warden Calderon's "pleading" gave rise to irregularities in the procedural and substantive development of the record on this matter. Since there was no properly prepared or pled motion from Warden Calderon before the District Court seeking to vacate or modify the District Court's prior order granting an evidentiary hearing, when the District Court called for his response, Mr. Silva was compelled to brief and to oppose an amorphous issue. While it was clear that Warden Calderon was seeking to vacate the order granting Mr. Silva an evidentiary hearing; the grounds, the theory and the authority upon which

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further states that "No motion will be considered by the Court unless it meets the requirements of Local Rule 7."

Warden Calderon based his position were unarticulated. Even when he filed his written reply to Mr. Silva's request that the District Court sustain its prior grant of an evidentiary hearing, Warden Calderon never addressed the theory he now advances regarding the impact of the Act and the significance of its legislative history.

This alone is a reason for which this Court should deny such permissive appellate review. "As a general rule, an appellate court will not consider arguments which were not first raised before the district court, absent a showing of exceptional circumstances." *Federal Sav. and Loan Ins. Corp. v. Butler*, 904 F.2d 505, 509 (9th Cir. 1990).[18]

If Warden Calderon is granted leave to appeal the District Court's decision, then this issue will be litigated before this Court without having been presented to or ruled upon by the District Court. Mr. Silva respectfully submits that this is not the objective of permissive interlocutory appeals brought under 28 U.S.C. §1292(b), and the petition for leave to file such an interlocutory appeal should accordingly be denied.

CONCLUSION

Warden Calderon's petition for leave to file an interlocutory appeal does not satisfy the standards which govern permissive appeals under 28 U.S.C. §1292(b). He has failed to

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18 In his petition to this Court, Warden Calderon, for the first time, advances the argument that the legislative history of this Act contradicts the interpretation given by the District Court. In addition to not having been presented to the District Court, this argument is advanced in great part without accompanying citations. Mr. Silva takes exception to both procedural deficiencies and he seeks an order from this Court directing those portions of the pleading be stricken from the record. In the alternative, Mr. Silva asks this Court direct that appropriate citations be provided to substantiate the asserted propositions.

demonstrate what controlling question of law exists that mandates immediate review; he has failed to demonstrate how the litigation in the District Court would be materially advanced thereby; and he has failed to demonstrate why this is an instance where this Court could afford other litigants guidance in the application of the new legislation at hand.

There can be no prejudice to Warden Calderon from a decision by this Court declining to grant permission to appeal this question at this juncture since his right seek review after conclusion of the District Court's proceedings will not be diminished thereby. *Balla v. Idaho State Board of Corrections*, 869 F.2d 461 (9th Cir. 1989). It is respectfully urged that this Honorable Court deny the Petition for Permission to File an Appeal in this matter.

Respectfully submitted,

Dated: May ___, 1997

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Phillip A. Treviño